

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

Appellate

76-4120

To be argued by
MARY P. MAGUIRE

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 76-4120

ROGER INNOCENT,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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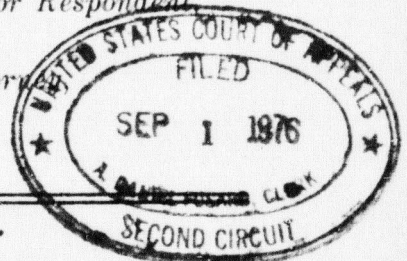


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Docket No. 76-4120

ROGER INNOCENT,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF FOR RESPONDENT

Issues Presented

1. WHETHER THE BOARD OF IMMIGRATION APPEALS PROPERLY DENIED PETITIONER'S APPLICATION FOR WITHHOLDING OF DEPORTATION PURSUANT TO SECTION 243(h) OF THE IMMIGRATION AND NATIONALITY ACT.

2. WHETHER THIS COURT HAS JURISDICTION TO REVIEW THE IMMIGRATION JUDGE'S DENIAL OF PETITIONER'S APPLICATION FOR THE PRIVILEGE OF VOLUNTARY DEPARTURE.

Statement of the Case

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a, Roger Innocent petitions this Court for review of a final order of deportation entered by the Board of Immigration

Appeals (the "Board") on April 22, 1976. That order dismissed an appeal from a decision of an Immigration Judge denying the petitioner's application for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. § 1253(h). Petitioner contends that the Board's order should be reversed because the denial of his application for withholding of deportation was an abuse of discretion.

Statement of Facts

The petitioner, Roger Innocent ("Innocent") is a fifty-five year old alien, a native and citizen of Haiti, who entered the United States illegally at a point on the Canadian-United States border on January 21, 1971. The petitioner, together with the driver of the car who brought him across the Canadian Border, were immediately apprehended by the Border Patrol upon crossing the border.*

On January 25, 1971 the Immigration and Naturalization Service (the "Service") commenced deportation proceedings against the petitioner with the issuance of an order to show cause and notice of hearing (AR 93)** charging that he was deportable from the United States under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2), in that he had entered the United States without inspection. At the deportation hearing held on February 22, 1971, the petitioner, by his counsel, conceded his deportability as charged in the order to show cause and requested that he be granted the privilege of voluntary departure (AR 71-72). The Immigration Judge granted

* Petitioner was convicted on his plea of guilty to a violation of 8 U.S.C. § 1325 and was sentenced to a 30 day jail term.

** References preceded by the letters "AR" are to the administrative record previously filed with the Court.

the petitioner's request for voluntary departure and also entered an alternate order of deportation to France, the country designated by petitioner, in the event petitioner failed to depart voluntarily by the prescribed date. The Immigration Judge further ordered that in the event France refused to accept petitioner the case would be remanded to the Immigration Judge for further proceedings since the alternate country of deportation was designated to be Haiti. Petitioner had indicated that he would submit an application for withholding of deportation pursuant to Section 243(h) of the Act since he feared political persecution in Haiti (AR 66-68).

Petitioner did not depart voluntarily from the United States and the alternate order of deportation to France could not be enforced since France had refused to accept Innocent as a deportee (AR 85). Consequently, on July 26, 1972 the Service requested an advisory opinion from the Department of State, Office of Refugee and Migration Affairs, with respect to Innocent's request for political asylum (AR 83-84). By letter dated August 23, 1972 the Department of State advised the Service that on the basis of the information submitted by petitioner the Department was unable to conclude that petitioner would suffer persecution in Haiti (AR 82). Subsequently, on February 27, 1973 the Service advised Innocent that there was no basis for granting his request for political asylum (AR 19).

At the reopened hearing on June 20, 1973 petitioner testified in support of his application for withholding of deportation to Haiti pursuant to Section 243(h), 8 U.S.C. § 1253(h), based on his fear of political persecution in Haiti. The petitioner's sole evidence for relief under this application was his own testimony to the effect that he would suffer persecution upon his return to Haiti because of his and his family's past political activities

in supporting a candidate opposed to Duvalier in the 1957 election. On August 13, 1975 * the Immigration Judge rendered a decision denying the alien's application for withholding of deportation pursuant to Section 243(h) of the Act, finding that he had failed to demonstrate that there was a clear probability of persecution in his case. The Immigration Judge also denied Innocent the continued privilege of voluntary departure (AR 11-13). On August 25, 1975 the petitioner appealed the decision of the Immigration Judge to the Board of Immigration Appeals (AR 9). On April 22, 1976 the Board dismissed the appeal on the ground that Innocent had failed to show a well-founded fear of political persecution. Since the filing of this petition on May 12, 1976 the alien has enjoyed the automatic statutory stay of deportation which accompanies the filing of a petition pursuant to Section 106 of the Act, 8 U.S.C. § 1105a.

Relevant Statute

Immigration and Nationality Act, 66 Stat. 163 (1952),
as amended:

Section 243, 8 U.S.C. § 1253—

* * * * *

* The delay of more than two years between the reopened hearing and the Immigration Judge's decision was due to the fact that on July 26, 1973 Innocent married one Loretta Johnson, a United States citizen. She subsequently filed a visa petition to accord Innocent the status of an immediate relative, thereby exempting him from the numerical limitations on Western Hemisphere immigration and from the labor certification requirements of Section 212 (a) (14) of the Act. The Service denied the visa petition on July 15, 1974 and an appeal from that decision was dismissed by the Board on February 24, 1975 (AR 22-24). A motion to reopen the visa petition proceedings was denied by the Board on September 15, 1975 (AR 8).

(h) the Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

Section 244, 8 U.S.C. § 1254—

* * * * *

(e) the Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

* * * * *

Relevant Regulations

Title 8, Code of Federal Regulations (8 C.F.R.)—
8 C.F.R. § 242.17—

(c) *Temporary withholding of deportation.*
The special inquiry officer [Immigration Judge] shall notify the respondent that if he is finally ordered deported his deportation will in the first instance be directed pursuant to section 243(a) of the Act to the country designated by him and shall afford the respondent an opportunity then and there to make such designation. The special inquiry officer shall then specify and state for the record the country, or countries in the alternate,

to which respondent's deportation will be directed pursuant to section 243(a) of the Act if the country of his designation will not accept him into its territory, or fails to furnish timely notice of acceptance, or the respondent declines to designate a country. The respondent shall be advised that pursuant to section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion, or political opinion as claimed.

* * *

(d) *General.* An application under this section shall be made only during the hearing. . . . The respondent shall have the burden of establishing that he is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. * * *

Title 8, Code of Federal Regulations (8 C.F.R.)—
8 C.F.R. § 244.1

Pursuant to Part 242 of this chapter and section 244 of the Act a special inquiry officer [Immigration Judge] in his discretion may authorize the suspension of an alien's deportation: or, if the alien establishes that he is willing and has the immediate means with which to depart

promptly from the United States, a special inquiry officer in his discretion may authorize the alien to depart voluntarily from the United States in lieu of deportation within such time as may be specified by the special inquiry officer when first authorizing voluntary departure, and under such conditions as the district director shall direct.

* * *

ARGUMENT

POINT I

The Attorney General did not abuse his discretion in denying petitioner's application for temporary withholding of deportation.

A. General Background

Section 243(h) of the Act, 8 U.S.C. § 1253(h), authorizes the Attorney General to withhold deportation when "*in his opinion* the alien would be subject to persecution on account of race, religion or political opinion." (Emphasis added.) Thus, the determination whether to withhold deportation rests wholly in the administrative judgment and opinion of the Attorney General or that of his duly authorized delegate.* *Muscardin v. Immigration and Naturalization Service*, 415 F.2d 865 (2d Cir. 1969); *United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392 (2d Cir. 1953).

As an applicant for the statutory benefit, the burden is upon the alien to establish that he warrants the favor-

* The Attorney General has delegated his authority to the Immigration Judge, 8 C.F.R. 242.8(a) and to the Board of Immigration Appeals, 8 C.F.R. 3.1.

able exercise of discretion. 8 C.F.R. § 242.17(c); *Chen v. Foley*, 385 F.2d 929 (6th Cir. 1967), *cert. denied*, 393 U.S. 838 (1968). The statute requires a showing not only that the alien concerned is likely to be persecuted in the country of deportation, but that such persecution will be imposed for religious, racial or political reasons. Moreover, this Circuit has determined that only where there is a clear probability of persecution to the particular alien is this discretionary power to be favorably exercised. *Cheng Kai Fu v. Immigration and Naturalization Service*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). See also *Hyppolite v. Immigration and Naturalization Service*, 382 F.2d 98 (7th Cir. 1967); *Lena v. Immigration and Naturalization Service*, 379 F.2d 536 (7th Cir. 1967).

In its most recent opinion in a Section 243(h) case, this Court indicated that the determination whether or not persecution, within the meaning of § 243(h), would actually occur in the event of deportation was a finding of fact—distinct from the exercise of administrative discretion to stay deportation—and “must pass the substantial evidence test.” *Zamora v. Immigration and Naturalization Service*, — F.2d — (2d Cir. decided April 29, 1976), quoting *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715, 717 (2d Cir. 1966). Thus, the decision process of the Board with respect to a Section 243(h) application is a two-step process. See *United States ex rel. Kordic v. Esperdy*, 386 F.2d 232, 238 (2d Cir. 1967). First, the Board determines, as a factual matter, the probability that petitioner would be subject to persecution; second, the Board must exercise its discretion on the facts found. This Court’s review of the second step of the process, the Board’s exercise of discretion, is governed by the much less demanding “abuse of discretion” standard.

Hamad v. Immigration and Naturalization Service, 420 F.2d 65 (D.C. Cir. 1969); *Zamora v. Immigration and Naturalization Service*, *supra*, fn. 3. In examining the broad exercise of discretion as conferred upon the Attorney General's delegate, the scope of review in this Court is extremely narrow and limited to a determination of whether there has been an abuse of discretion. *Muscardin v. Immigration and Naturalization Service*, *supra*. Unless that determination is found to be without any rational explanation, to depart inexplicably from established practices or to rest on an impermissible basis, the Court should not substitute its judgment for that of the Attorney General. *Wong Wing Hang v. Immigration and Naturalization Service*, *supra*.

Accordingly, the issue before the Court is whether the Attorney General has abused his discretionary authority by denying the petitioner's application for withholding of deportation. *Li Cheung v. Esperdy*, 377 F.2d 819 (2d Cir. 1967); *Kladis v. Immigration and Naturalization Service*, 343 F.2d 515 (7th Cir. 1965).

B. The evidence before the Attorney General failed to establish a clear probability of political persecution

From the facts of this case it is evident that there has been no abuse of discretion. The Immigration Judge amply supported his decision in reason. The reasons relied upon by him and affirmed by the Board were neither arbitrary nor capricious. The decision did not inexplicably depart from established policies; nor did it rest on an impermissible basis such as an invidious discrimination against a particular race or group. The Immigration Judge followed the well-established rule that withholding of deportation is warranted only where there is a clear probability of persecution of the particular alien. *Fu v. Immigration and Naturalization Service*, *supra*.

Under 8 C.F.R. 242.17(c) the petitioner has the burden of establishing that he would be subject to persecution. *MacCaud v. Immigration and Naturalization Service*, 500 F.2d 355 (2d Cir. 1974). This he was unable to do. The basis of Innocent's claim is his testimony that he and his father were supporters of Jumel, the opponent of Duvalier, in the 1957 election and that subsequently members of his family, including himself, suffered under the Duvalier regime. He makes the unsupported * claim that his father was imprisoned for a few months in 1959 and that subsequently, in 1960, after his release, his father died, allegedly from the mistreatment he suffered. He testified further that his step-brother was arrested at the same time as his father and that his whereabouts are unknown.

Although petitioner claims a fear of political persecution because of his activities on behalf of Jumel in the 1957 election, he also testified that he continued to live in Haiti until December 1970. There is no evidence that petitioner was interfered with in any way by the Haitian Government of Duvalier. Indeed, it appears from the record that petitioner continued to reside in his family's home and to operate the family bakery. It was only when both properties appeared lost to petitioner's family by reason of mortgage foreclosures that Innocent made any attempt to leave Haiti and to enter the United States. He concededly made no attempt to leave Haiti in the mid-1960's with his mother and brother, both of whom had secured immigrant visas to enter the United States.

* Although petitioner's claim is based on alleged persecution of himself and his family in Haiti, neither his mother nor his brother, both of whom are lawful permanent residents, testified in support of petitioner's claim.

It is submitted that there is substantial evidence in the record to support the Board's finding that Innocent failed to sustain his burden of showing a well-founded fear that his life or freedom will be threatened in Haiti on account of his race, religion, nationality, or membership in a particular social group or political opinion. Petitioner has not met the burden of proving that he would be singled out as an individual and persecuted upon his return to Haiti. Accordingly, there was no abuse of discretion in denying him withholding of deportation.

POINT II

This court lacks jurisdiction to review the Immigration Judge's denial of petitioner's application for the privilege of voluntary departure.

At the conclusion of the deportation hearing held on February 22, 1971 petitioner was granted the privilege of voluntary departure until April 1, 1971 upon his representation that he would attempt to depart to France where his son resides. At the reopened hearing on June 20, 1973, petitioner, through his attorney, again applied for the privilege of voluntary departure. However, petitioner's testimony at the reopened hearing indicated that he had made no attempt to enter France but decided to remain with his family in the United States (AR 62). The Immigration Judge denied the privilege of voluntary departure since he found petitioner not ready, willing and able to leave the United States (AR 11).

Petitioner's notice of appeal to the Board did not specifically mention the denial of voluntary departure. In oral argument before the Board, petitioner's attorney, his present counsel, stated that he was not pressing the voluntary departure issue because there was no country to which petitioner could go if granted the privilege (Appendix to Petitioner's Brief, p. 55a-56a).

Petitioner's argument that the Immigration Judge abused his discretion in denying petitioner's application for voluntary departure in 1973 should fail for several reasons. First, upon appeal and *de novo* review at the Board of Immigration Appeals the petitioner failed to raise his present objection to the decision of the Immigration Judge. Indeed, petitioner, through his attorney, withdrew his voluntary departure request during the course of oral argument at the Board. In doing so, petitioner's attorney made it clear that the withdrawal was due to the fact that petitioner was not eligible for the privilege since he was unable to obtain entry documents to any country other than Haiti. See 8 C.F.R. 244.1. Thus, although petitioner could have contested the Immigration Judge's decision before the Board, he chose not to do so. It is submitted that any objection now raised by petitioner should have been timely raised in the administrative proceedings and administrative decisions should not be reversed unless the administrative body has erred against an objection that was properly raised below. See *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492, 500-01 (1954); *N.L.R.B. v. Newton-New Haven Co.*, 506 F.2d 1035, 1038 (2d Cir. 1974); *K.F.C. National Management Corp. v. N.L.R.B.*, 497 F.2d 298, 300 (2d Cir. 1974). It is respectfully submitted that the petitioner should not be heard to complain on a belatedly conceived objection which was not raised in the proceedings below.

Secondly, petitioner's application for the renewed privilege of voluntary departure was properly denied by the Immigration Judge since the petitioner refused to submit any evidence in support of his application. During the course of the reopened hearing on June 20, 1973 petitioner stated that he had not availed himself of the privilege of voluntary departure because he did not wish to be a burden on his son in France and had

decided that it would be "cheaper" to remain in the United States with his family (AR 62). In making a request for renewed voluntary departure, however, petitioner declined to submit any evidence to show that petitioner was willing and able to depart promptly from the United States, as required by 8 C.F.R. 244.1 (AR 27).

Finally, the Immigration Judge's denial of petitioner's application for renewed voluntary departure was not an abuse of discretion. The Attorney General is authorized by Section 244(e) of the Act, 8 U.S.C. § 1254(e), to grant the privilege of voluntary departure to an otherwise deportable alien as a matter of discretion. The only statutory requirement for eligibility under this provision is that the alien establish that he is and has been a person of good moral character for at least five years immediately preceding his application. The Attorney General has set forth standards in 8 C.F.R. 244.1, under which an application for voluntary departure will be considered. This regulation provides that the Immigration Judge in his discretion may grant voluntary departure if the alien "establishes that he is willing and has the immediate means with which to depart promptly from the United States."

The grant of voluntary departure pursuant to Section 244(e) of the Act, 8 U.S.C. § 1254(e), is a privilege that may be awarded to deserving but deportable aliens. Like other ameliorative features in the Act, it is a benefit that may be granted or withheld in the sound discretion of the Attorney General and his authorized delegate. *Bartsch v. Watkins*, 175 F.2d 245 (2d Cir. 1949); *Strantzalis v. Immigration and Naturalization Service*, 465 F.2d 1016 (3d Cir. 1972). Although an alien has a right to a discretionary determination, the granting of the privilege is not a matter of right, but

of administrative grace. *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957). In order to warrant the favorable exercise of discretion, the alien must establish in good faith that he is willing and able to depart promptly from the United States.

It is submitted that the denial of petitioner's application for renewed voluntary departure was a sound exercise of discretion. The absence of good faith, the use of dilatory tactics and the failure to depart within the initial period set by the Immigration Judge may in and of itself be a sufficient ground for the denial of additional discretionary relief. *Fan Wan Keung v. Immigration and Naturalization Service*, 434 F.2d 301 (2d Cir. 1970); *United States ex rel Lee Pao Fen v. Esperdy*, 423 F.2d 6 (2d Cir. 1970); *Lam Tat Sin v. Esperdy*, 277 F. Supp. 482 (S.D.N.Y. 1964), *aff'd*, 334 F.2d 999 (2d Cir. 1963), *cert. denied*, 379 U.S. 901 (1964). The petitioner was previously granted the privilege of voluntary departure on the basis of his representation that he would seek entry into France to join his son. This later testimony reveals, however, that he never even attempted to seek entry into France or into any other country. By virtue of his conduct with respect to the previous grant of voluntary departure and by virtue of his refusal to submit any evidence in support of his second application, petitioner has failed to satisfy the requirement that he establish his willingness and ability to depart promptly. It is respectfully submitted that the denial of petitioner's application for renewed voluntary departure was not, therefore, an abuse of discretion.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
31st day of August, 1976 she served ^{two} ~~a~~ copy^s of the
 within Respondent's Brief

by placing the same in a properly postpaid franked envelope addressed:

Claude Henry Kleefield, Esquire
Suite 400
100 West 72nd Street
New York, New York 10023

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Marian L. Bryant

31st day of August, 19 76

Joseph Lee